United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

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76-4110

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SAMUEL H. SLOAN,

Petitioner

-against-

SECURITIES & EXCHANGE COMMISSION,

Respondent.

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P/S

PETITIONER'S BRIEF

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TABLE OF CONTENTS

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SECURITIES & EXCHANGE COMMISSION,

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PETITIONER'S BRIEF

QUESTIONS PRESENTED

1. Is there substantial evidence in the record to support the suspension by the Securities & Exchange Commission of trading in Canadian Javelin Ltd.?

2. Since the record contains no evidence, substantial or otherwise, to support the suspension of trading in Canadian Javelin Ltd., must the order of suspension be set aside?

3. Does the proceeding sought to be reviewed here provide an adequate remedy at law in the case of a security which has been wrongfully suspended?

4. Has the petitioner been unconstitutionally deprived of his right to notice and the opportunity for a hearing?

5. Were the trading suspensions illegal in that Section 12(k) of the Securities Exchange Act of 1934 only gives the Securities & Exchange Commission the authority to suspend trading in a security for a period not to exceed ten (10) days whereas in this case the Securities & Exchange Commission suspended trading in Canadian Javelin Ltd. on a continuous basis for more than one year?

6. Is Section 12(k) of the Securities Exchange Act of 1934 unconstitutional facially and as applied in this case?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Paragraph 2, in pertinent part, states:

"The trial of all crimes.....shall be by jury....."

Amendment V, in pertinent part, states:

"No person.....shall be compelled in any criminal case to be a witness against himself, nor be deprived of....liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

STATUTORY PROVISIONS INVOLVED

Section 12(k) of the Securities Exchange Act of 1934, 15 U.S.C. 78 l(k), states:

"If in its opinion the public interest and the protection of investors so require the commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase of sale of any security in which trading has been suspended."

STATEMENT OF THE CASE

This case is a sequel to Sloan v S.E.C., 527 F. 2d 11 (2d Cir. 1975) cert. denied June 14, 1976. There the petitioner instituted an "action essentially to protest a series of S.E.C. suspension of trading orders imposed on the stock of Canadian Javelin Ltd." Id. The opinion of this Court concluded as follows:

"We therefore dismiss Sloan's appeal but without prejudice to his repleading after an administrative hearing before the S.E.C., from which judicial review may be sought."

Immediately following this decision, the petitioner, Samuel H. Sloan ("Sloan"), wrote to the S.E.C. and demanded a hearing. After considerable delay, the Secretary of the Securities & Exchange Commission advised Sloan that no opportunity for a hearing would be granted unless Sloan could supply an affidavit setting forth facts, which Sloan was willing to verify that he intended to prove at such a hearing, which would demonstrate that the S.E.C. had abused its discretion.[1]

Thereafter, Sloan, while objecting to this requirement, filed with the S.E.C. a "verified petition for review" of the orders of suspension of trading in Canadian Javelin Ltd. This petition set forth facts which, if proven, would demonstrate that in suspending trading in Canadian Javelin Ltd., officers of the S.E.C. had abused their discretion and had violated several federal laws as well. (A95). The Petition was received by the S.E.C. on March 11, 1976. (A89). On April 21, 1976, after entering four more suspension orders without action on Sloan's petition (A73, A76, A79, A82), the S.E.C. responded with a letter stating that Sloan's allegations constituted nothing more than "speculation" and that therefore Sloan would not be granted the opportunity for a hearing and the suspension of trading would continue. (A85-86).

By this time, the S.E.C. received letters from a large number of persons who protested the suspensions of trading in Canadian Javelin Ltd. As the result of a Freedom of Information Act request, the S.E.C. has made copies of some of these letters from the 1973-1974 period available to Sloan and a motion is being filed concurrently in this Court to have this material included in the record of this proceeding. In most cases, the name of the person who wrote the letter was deleted before this

1. The S.E.C. has chosen not to include this correspondence in the record of this proceeding.

material was released to Sloan. However, there are a few letters in which the name of the author is revealed and it can be seen that three United States Congressmen and United States Senator James L. Buckley wrote to inquire as to the reasons for the trading suspensions. These letters, in general, demonstrate public outrage arising from the suspension of trading as well as frustration at the unavailability of legal remedies. For example, M. Garabedian of Latham, N. Y. wrote as follows:

> "I am a stock holder of this company and right now I am confused on the S.E.C. action that halted trading last October. This is the second such action on your part. Except for one item in the paper, there hasn't been any information forthcoming since then. You are treating us unfairly both in your silence and in the handling of this stock."

At the conclusion of this letter, Mr. Garabedian stated:

> "By copy of this letter, I am asking Mr. Louis J. Lefkowitz, the New York Attorney General to assist me to determine whether your actions have been:
> 1. Unwarranted, and in bad faith?
> 2. Obstructionist and arbitrary.
> I am also asking Mr. Lefkowitz to assist me in obtaining release from the restriction halting trading."

Mr. Dan A. H. Olson of Redondo Beach, California wrote:

> "I am writing to protest the continued outrageous suspension by the S.E.C. of Canadian Javelin Ltd. from trading on the AMSE. It has now reached <u>five</u> weeks." (emphasis in original)

The letter concluded:

> "There was no real justification for suspending it at all in the first place, but to continue the suspension now for five weeks already is just vindictiveness at its worst. As a result of this suspension Javelin shares have dropped from about $15 down to $7 on the Canadian Stock Exchange. What a rotten business!
> If the S.E.C. really wants to go after something worthwhile, why doesn't it suspend Goodyear Tire & Rubber, American Shipbuilding, American Airlines, Braniff Airways, Gulf Oil and Ashland Oil. All these companies have been found to have made illegal contributions to re-elect the president in 1972. That would make some sense."

In response to these letters, and there appear to have been several hundred since the S.E.C. has stated that it would be releasing only part of the requested material to Sloan, the S.E.C. sent a cursory note which,

in Mr. Olsen's case, consisted of four sentences: one to open, one to close, one to say that a copy of an S.E.C. litigation release, which was issued when trading was first suspended, was being enclosed, and one which stated: "I believe the release will answer most of your questions." In no case was the author of any of these letters, which included lawyers, stockbrokers and congressmen, given the opportunity for a hearing or advised that the opportunity for a hearing might be available. Although in some cases the response of the S.E.C. staff referred the letter writers to their "judicial remedies," a statement was thereafter made that the S.E.C. was not in a position to get "involved" in these court proceedings. It is thus clear that the "judicial remedies" the S.E.C. staff had in mind were in the form of a private civil damage suit against Canadian Javelin Ltd., not a court proceeding brought against the S.E.C.

On April 19, 1976 Sloan filed a petition for a writ of certiorari to review the decision of this Court. After Sloan filed his petition, the S.E.C. allowed its suspension of trading in Canadian Javelin Ltd. and all other securities, with one exception, to terminate. That exception was the successor to Equity Funding Corp. Thus, when the Solicitor General filed in the Supreme Court on May 30, 1976 the response to Sloan's petition, the only two suspensions then in effect were that of the successor to Equity Funding Corp. and that of Continental Vending Machine Corp. and on June 2, 1976 the S.E.C. terminated the latter suspension. Continental Vending Machines Corp. had been suspended on a continuous basis since March 8, 1963. See Wall Street Journal, June 3, 1976. Thus, although the S.E.C. had simultaneously suspended trading in 34 securities only one month earlier, see Securities Exchange Act Release No. 12360 (April 22, 1976), it appears that the S.E.C. decided to curtail its policy of massive trading suspensions at least for the period of time in which Sloan's petition

for a writ of certiorari would be before the Supreme Court. As a result the Solicitor General, on page 2 of his response, was able to present the question of:

> "Whether the foregoing issues have become moot because no order summarily suspending trading is any longer in effect."

On June 14, 1976 Sloan's petition for a writ of certiorari was denied. However, the number of current suspensions is still comparatively low with only five presently outstanding. This is less than the number of suspensions which were ever outstanding at any one time for several years prior to the date of the Solicitor Generals response.

The instant petition was filed immediately after the S.E.C.'s decision of April 21, 1976. Sloan simultaneously filed in this Court a request for an order to show cause and for a stay and immediate judicial review of the S.E.C.'s order of suspension of trading. An attorney for the S.E.C. then telephoned the office of the clerk of the court and said that the trading suspension of Canadian Javelin Ltd. would terminate after another ten days. This fact was not revealed to Sloan or to the general public at that time. Apparently, based upon this representation, this Court decided not to sign the order to show cause and not to hear this appeal on an expedited basis or at all until after the suspension of trading had terminated. Consequently, this appeal is being briefed at this time.

SUMMARY OF ARGUMENT

The record of this proceeding establishes that from the time the S.E.C. initiated the series of suspensions which are the subject of this petition until the date when the suspensions were terminated, no statement was issued to the public as to the reasons for the trading suspensions.

The only time the S.E.C. ever indicated what reason it might have for suspending trading came when, on April 21, 1976, the S.E.C. replied to Sloan's petition. This response made vague statements concerning reasons for the trading suspensions but set forth no specific facts which would warrant the action the S.E.C. took. In addition, since the contents of this letter were not published or otherwise released to the general public, only Sloan and the employees of the government who are involved in this case are aware of the existance of this meagre information as to the reasons for the trading suspension. Under these circumstances, it is obvious that the S.E.C. has abused its power summarily to suspend trading in a security and that this abuse of power should not be allowed.

It is also obvious that the suspensions of trading were illegal both because they were violative of the statute and because the statute fails to provide for the constitutionally required remedies. The statute states that the S.E.C. has the authority to suspend trading for a period not to exceed ten (10) days. The S.E.C., however, suspended trading for more than one year. This was plainly illegal.

Moreover, the trading suspensions are invalid because of the lack of "substantial evidence" to support them. In its prior decision, this Court expressly gave the S.E.C. a second chance to develop a record which would meet the substantial evidence test. The S.E.C. has made no effort to do so and has denied Sloan the opportunity for an administrative hearing. As a result, the trading suspensions must now be set aside.

The record of this case demonstrates a contumaceous refusal of the S.E.C. to apply the statute in a manner consistant with the constitution.

Since the S.E.C. has offered no saving construction and since the S.E.C. is the only body empowered to administer the Securities Exchange Act, this Court should declare Section 12(k) of the Securities Exchange Act to be unconstitutional.

ARGUMENT

POINT I

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD WHICH SUPPORT THE TRADING SUSPENSION AND HENCE THE ORDERS OF THE SECURITIES & EXCHANGE COMMISSION MUST BE SET ASIDE.

Trading in Canadian Javelin Ltd. has been suspended during four distinct time periods. The first began on March 17, 1971 and ended on April 5, 1971. The second began on March 7, 1972 and ended on August 9, 1972. The third began on November 29, 1973 and ended on January 26, 1975. Although the weekly bulletin of the American Stock Exchange states that the S.E.C. suspension which is the subject of this petition began on April 30, 1975 and the prior Court of Appeals decision reflected this fact, it appears from the record the S.E.C. has filed here that the suspension in question actually commenced on April 29, 1975 at 3:45 P.M. Probably the reason for this misapprehension as to the dates is that due to the lateness of the hour trading was not affected on the American Stock Exchange on that date and presumably the American Stock Exchange did not become aware of the suspension until the following morning.

In any event, the suspension was terminated on May 2, 1976, or more than one year later. The S.E.C. has now filed a record which pruports to set forth the reasons for the trading suspension. The question here is whether these reasons are supported by "substantial evidence" because

if they are not, Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. ~ 78y(a) requires that the suspension orders be set aside.

The record filed by the S.E.C. consists of 37 separate suspension orders, Sloan's verified petition for review, and 38 "informational memorandums." Each suspension order is accompanied by a memorandum which purports to give the reasons for the trading suspension. The final memorandum discusses Sloan's verified petition for review. Thus, the record consists of a total of 76 documents.

The evidence which the S.E.C. proffers in support of its trading suspensions consist of the "informational memorandums." Unlike the record of the prior proceeding in this Court, the S.E.C. has not adopted the practice of deleting all references to names of individuals employed by the S.E.C. Thus, although these memorandums are unsigned, it still is possible to make an inference as to who might have written them. However, the S.E.C. has continued the practice, which it adopted in the prior proceeding in this Court, of deleting substantial portions of these memorandums so as to prevent Sloan and the judges of this Court from reading them. Nevertheless, in this proceeding the S.E.C. has adopted a different method of deleting the material. Previously, it apparently put a piece of white paper over the material it sought to excise and then made a photocopy which was filed in court. As a result, it was impossible to determine how many lines of material were left out. Here, the S.E.C. here has adopted the somewhat less objectionable practice of marking through everything it does not want this Court to read with heavy black ink. This at least enables someone who reads the record to determine how many lines of text have been deleted.

It is obvious that these memorandums do not constitute substantial evidence. The words of Justice Douglas, dissenting in United States v Nugent, 346 U.S. 1, 13 (1953) are pertinent:

> "The use of statements by informers who need not confront the person under investigation or accusation has such an infamous history that it should be rooted out from our procedure. A hearing at which these faceless people are allowed to present their whispered rumors yet escape the test of cross-examination is not a hearing in the Anglo-American sense."

Six years later, in Greene v McElroy, 360 U.S. 474, 496-497 (1959), the opinion of the full court expounded upon the principle which Douglas had previously set forth in dissent when it stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formaliced these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion."

The Supreme Court further quoted an authority who stated:

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strenght in lengthening experience."

With these principles in mind, it is obvious that the "informational memorandums" which the S.E.C. proffers as evidence to support the trading suspensions do not meet any kind of substantial evidence test. The memorandums set forth at best "whispered rumours." They are unsigned.

They have two, three or four names at the bottom and it is impossible to determine who is their true author. They were all written by employees of the government who have an interest in vindicating the government's authority. They were not authored by a medical doctor or by some other person who can claim to posses a comparable degree of professional expertise. And, of course, there is no opportunity to cross-examine these memorandums. In short, the memorandums are worthless from an evidentiary point of view.

It should be noted that this Court has already expressed agreement with this view. In the prior decision, it said that the record was "insurmountably sparse." However, the principal difference between the record here and the record of the prior proceeding is the inclusions of names at the bottom of the memorandums. Obviously, this change is not sufficient to transform an "insurmountably sparse" record into one with probative value.

Turning now to what the memorandums say, it is obvious again that they do not meet any kind of substantial evidence test. For one thing, as noted previously, all of the memorandums contain heavy black marks through those portions of the memorandums which the S.E.C. does not want Sloan or the judges of this Court to be able to read. Under these circumstances it is appropriate to make an inference comparable to that in Fifth Amendment cases. In other words, it must be presumed that the material which the S.E.C. refuses to disclose to this Court is unfavorable to the position the S.E.C. has taken. This would conform to the view the S.E.C. itself urged before this Court in S.E.C. v Stewart, 476 F. 2d 755, 757 (2d Cir. 1973).

Putting aside this question, and considering now those parts of the memorandums which the S.E.C. wishes this Court to be able to read, it can be seen that they are so vague and lacking in specifics as to be entirely without probative value. For one thing, it can be observed that many of the memorandums are identical. Professor Loss, in theorizing the circumstances under which the S.E.C. could suspend trading for a period longer than ten days, expressed the view that a new order could be entered if a new determination could be made of the necessity for a trading suspension. See 2 L. Loss, Securities Regulation, 854 (2d. ed. 1961).

In this case there were no new reasons for the trading suspensions which continued for more than one year other than the normal developments which could be expected to occur in the course of any activity which lasts a years time. Moreover, the memorandums contain nothing of substance. All of the statements are couched in vague terms. For example, the initial memorandum dated May 2, 1975 (A12), states as the reasons for the trading suspension:

> "The staff informed the Commission that the Royal Canadian Mounted Police ("RCMP") advised that they are conducting an extensive investigation into what they believe to be a manipulation of Canadian Javelin's common stock on several Canadian stock exchanges as well as the American Stock Exchange. They have also indicated that several United States residents and broker-dealers may also be involved in the manipulation."

The language of this paragraph is qualified by the appearance of the words "believe," "may" and "indicated." If the Royal Canadian Mounted Police had stated unequivocally that there was a manipulation and what the manipulation consisted of specifically, that would be one thing. However, the record here shows no such statement and there is no evidence to support the claim that there was a manipulation. It should be noted here that "manipulation" is itself a vague term and the S.E.C. in apparent disagreement with the Supreme Court of the United States as to what constitutes

a manipulation. In an amicus curiae brief filed in Ernst & Ernst v Hochfelder, ____U.S. ____, 47 L. Ed. 2d 668 (March 30, 1976) the S.E.C. contended that the word "manipulative" encompassed negligent conduct. See 47 L.Ed. 2d at 679-680. The Supreme Court emphatically rejected this view, stating:

> "The S.E.C.'s argument simply ignores the use of the words 'manipulative,' 'device,' and 'contrivance,' terms that make unmistakable a congressional intent to proscribe a type of conduct quite different from negligance. Use of the word 'manipulative' is especially significant. It is and was virtually a term of art when used in connection with securities markets. It connotes intentional and wilfull conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." Id.

It is clear from this and from footnotes 19 and 21 of the same decision that the S.E.C.'s view on May 2, 1975 as to what constitutes "manipulative activity" was not in accord with what Webster's International Dictionary says or in accord with what an "ordinary man" would believe to be manipulative. Thus, when the S.E.C. states in its May 2, 1975 memorandum that "several United States residents and broker-dealers may also be involved in the manipulation," it cannot be determined what, if anything, this statement means.

Subsequent memorandums repeat this practice. The memorandums dated May 23, 1975, May 30, 1975, June 16, 1975 and June 24, 1975 (A18, A19, A20 and A21) all contain the following paragraph.

> "This suspension began on April 29, 1975. It was prompted by a public announcement by the Royal Canadian Mounted Police ('RCMP') that it was conducting an extensive investigation into what it believed to be a manipulation of Canadian Javelin's common stock on several Canadian stock exchanges as well as the American Stock Exchange."

This paragraph was altered slightly and the new version of the paragraph appears in all of the memorandums from July 1, 1975 through April 2, 1976. However, although this paragraph which is found in each

of the S.E.C. staff memorandums starting with the one dated May 23, 1975 refers to a "public announcement" by the Royal Canadian Mounted Police, the text of this public announcement is not included in the record. Therefore, it is not possible to brief the question of whether this public announcement states further facts sufficient to warrant a trading suspension.[2]

As one turns the pages of these memorandums, one waits with anticipation to be told what the manipulation consists of specifically. However, on page 2 of the memorandum dated December 5, 1975 (A56), it is revealed that the case of the RCMP "for the most part, relates to activities in Canada prior to the January 27, 1975 resumption of trading in the U.S." Although approximately half of the paragraph which contains that statement and all of the next two paragraphs are blacked out because of the desire of the S.E.C. to keep this secret information from coming to view of the public, it is apparent from the December 5, 1975 memorandum that the S.E.C.'s initial suspension order and the orders that followed were all unjustified since none of the allegedly manipulative activities did or could have affected trading markets in the United States.

By the time of the December 5, 1975 memorandum, however, the S.E.C. claims to have started its own investigation which encompassed events which

2. In an effort to obtain, for the purpose of writing this brief, information about this public announcement, the petitioner called the S.E.C. Office of General Council and asked to be provided with a copy. He was told that this public announcement could be found in the April 30, 1975 Wall Street Journal. However, the April 30, 1975 Wall Street Journal article to which the petitioner was referred, appears to reflect informal statements made by Canadian police officers as opposed to anything comparable to the press releases frequently issued by the S.E.C. Accordingly, there is a question in the mind of the petitioner as to whether there was ever an official public announcement issued by the Royal Canadian Mounted Police. Hopefully, this question will be cleared up by the time this appeal is argued orally.

occurred inside of the United States. A paragraph from this memorandum which is to be found in every memorandum from the one dated July 21, 1975 through that of March 4, 1976, states:

> "The investigation to date has revealed that from the commencement of trading on January 27, 1975 until the Commission's trading suspension on April 29, 1975 CJV's stock has been continuously manipulated on the AMEX as well as several Canadian stock exchanges. The manipulation appears to involve Americans, Canadians and Panamanians. It also appears that John C. Doyle ("Doyle"), CJV's founder, former chairman of the executive committee and formerly a director has been behind the manipulation."

Again, although hinting darkly that John C. Doyle, who, as the memorandums of July 1, 1975 and July 15, 1975 note (A23, A25), has been a fugitive ever since an adverse decision of this Court in United States v Doyle, 348 F. 2d 715 (2d Cir. 1965) cert. denied, 382 U.S. 843 (1965), these memorandums fail to set forth what, if any, manipulative activity occurred.

Aside from vague references to manipulative activity, the major theme of these memorandums concerns the efforts of the S.E.C. staff to investigate the affairs of Canadian Javelin Ltd. It appears that problems developed in the course of this investigation, most of which were related to the fact that Canadian Javelin Ltd. is a Canadian corporation, that it has no direct ties with the United States other than its listing on the American Stock Exchange, and that all of its officers, directors and accountants reside outside of the territorial boundaries of the United States. As a result, the S.E.C. was not in a position to exercise its subpoena power and it was forced to seek, unsuccessfully as it turned out, to secure the cooperation of these individuals. The obvious quid pro quo of the arrangement proposed by the S.E.C. was that if the officers, directors and accountants for Canadian Javelin Ltd., would cooperate by agreeing to meet with and give sworn testimony before members of the S.E.C.

staff and by agreeing to waive their Fifth Amendment rights and their right to attorney-client privilege, the S.E.C. would consider lifting the trading suspension.

The memorandums trace the course of the ultimately futile effort to secure the cooperation of Canadian Javelin Ltd. and associated persons. The May 6, 1975 memorandum states that the S.E.C. staff had met with counsel for Canadian Javelin Ltd. and had requested a press release. Since Canadian Javelin Ltd. is known to issue press releases on almost every occasion, it is obvious that the S.E.C. was not seeking just any press release but rather that it wanted a press release which admitted guilt. Although the May 6, 1975 memorandum states: "We anticipate receiving their press release within a few days" (A14), and the May 12, 1975 memorandum repeats this statement (A16), the May 23, 1975 memorandum says that (A18): "Company counsel previously indicted (sic) that they intend to submit an appropriate release, but have not yet done so." (emphasis supplied).

This sentence is repeated in the next three memorandums (A19, A20, A21) which continue through June 24, 1975, and, incidently, the word "indicted" can be found in every memorandum.

By the time of the July 1, 1975 memorandum (A22-23), the S.E.C. staff had apparently abandoned its hope of obtaining from Canadian Javelin Ltd. a press release admitting culpability. This and the four proceeding memorandums contain a statement that Canadian Javelin Ltd. is a "chronic violator." (A18-22). The July 1, 1975 memorandum indicates that at about this time the S.E.C. got around to conducting its own investigation of Canadian Javelin Ltd. It states (A22):

"Since continuance of the Commission's last 10 day trading suspension, members of the staff have taken testimony in this matter in Montreal, and St. John's, Newfoundland and information is being exchanged with the RCMP."

However, no specifics are given as to what testimony was taken or what information was exchanged.

The memorandum does, however, state that on June 27, 1975 the S.E.C. staff met with representatives of the American Stock Exchange who agreed to continue their own trading suspension "until the Commission is in a position to reveal the extent of the manipulation and its participants." (A22).

The July 1, 1976 memorandum also states that the S.E.C. staff had met with"special counsel of the company" (A23). This reference is somewhat misleading because the "special counsel" to whom the memorandum obviously refers is one Meyer Eisenberg, a former employee of the S.E.C. who maintains his law office in Washington, D.C. and who was appointed by a court order at the request of the S.E.C. to represent Canadian Javelin Ltd. This order was the subject of another appeal filed in this court as S.E.C. v Canadian Javelin Ltd., Dkt. No. 75-6130. However, after Canadian Javelin Ltd. had filed its brief in that appeal, which protested the appointment of Meyer Eisenberg as its attorney, a change in the board of directors of Canadian Javelin Ltd. occurred and the new board agreed to a dismissal of the appeal by stipulation. The appeal was in fact dismissed on April 23, 1976. These facts are alluded to in the memorandums dated December 19, 1975 (A58) through April 2, 1976 (A84). Obviously, a meeting by the S.E.C. staff with Meyer Eisenberg under these circumstances would not be likely to reveal any new information about Canadian Javelin Ltd.

According to the memorandum of July 1, 1975, the reason for meeting with Meyer Eisenberg was to request him to investigate several transactions involving Canadian Javelin Ltd. "during the height of the alleged manipulation" and to arrange for a meeting with Mr. Doyle (A23). This memorandum also states for the first time that:

> "The staff has traced Mr. Doyle's telephone in Nassau to have been frequently called by certain persons believed to have been directly involved with wash trading during the relevant period."

Following the usual pattern, the July 15, 1975 memorandum (A24-25) is identical to the July 1, 1975 memorandum (A22-23). The July 21, 1975 and August 1, 1975 memorandums (A26-27, A28-29), however, are different. They state:

> "Soon after the staff began issuing subpoenas, most of the U.S. residents who participated in the scheme fled to Panama. Recently, an old time securities violator and close associate of Doyle refused to testify invoking his 5th Amendment rights. Doyle has also recently indicated, through counsel, that he is reluctant to testify in this matter.
>
> The staff is communicating with the Quebec Securities Commission, the Grand Caymen police, and the Bahamian authorities and plans to meet with several company officials in the near future. It is anticipated that this investigation will conclude soon thereafter."

These paragraphs are deleted in the next memorandum, which is dated August 11, 1975, and substituted in its place is a paragraph which states that the S.E.C. has requested a meeting with the president of CJV, Canadian counsel for CJV and the partner in charge of Lee & Martin, the company's independent auditors, and that the S.E.C. staff has been informed that Doyle is now receptive to a meeting. (A31). However, the next memorandum, dated August 21, 1975, states that (A33):

"Canadian counsel for CJV has informed the staff that approval of the board of directors is necessary in order for the president of CJV and its counsel to testify before the Commission and to furnish information concerning certain sensitive areas involving corporate activities. For this reason, they have sought postponements concerning their appearances and they anticipate testifying within the next week or so."

The September 2, 1975 memorandum contains the same paragraph (A35), apparently forgetting that by that time a week had passed. The September 11, 1975 memorandum changes the text by stating that the scheduled appearances "have been postponed" (A37). That statement is repeated in the September 23, 1975 memorandum (A39). However, the October 1, 1975 memorandum makes it clear that the efforts by the S.E.C. staff to obtain testimony and other evidence on this basis have proven futile. The memorandum states that on September 28 and 29, 1975, the board of directors of Canadian Javelin Ltd. met in Costa Rica, which appears a good place to be for those who wish not to cooperate with the S.E.C., and although it agreed to furnish information to the S.E.C. staff, it "refused to waive any attorney-client privilege" (A41). This arrangement is apparently unacceptable to the S.E.C., see S.E.C. v Csapo, 533 F. 2d 7, 9 (D.C. Cir. 1976). This memorandum also states that neither the President of CJV nor Doyle nor his son intended to meet with the S.E.C.'s staff and that the "staff intends to pursue every available recourse to compel the testimony of these witnesses" (A41).

The text of the October 1, 1975 memorandum is repeated verbatum in the October 10, 1975 memorandum (A43-44) which accompanies the order suspending trading dated October 15, 1975 (A42). This was, coincidently, the date of this Courts prior opinion. It is apparent that by this time the S.E.C.'s investigation, to the extent that it ever existed, had es-

sentially ground to a halt.

The succeeding memorandums deal with efforts by the S.E.C. staff to pursue various paths. The tone of these memorandums can be compared to Mr. Macaber's repeated assertion that "something will turn up." The October 17, 1975 memorandum complains that Canadian Javelin Ltd. had disengaged the Washington, D.C. law firm of Steptoe & Johnson from representing it before the S.E.C. (A46). This memorandum implies that this occurred because Steptoe & Johnson had "recommended that CJV and its officers and directors cooperate with the staff in this investigation." It also complains that Canadian counsel for CJV had decided to retain ccunsel before meeting with the staff of the S.E.C. (A46). The next memorandum, dated October 31, 1975, says for the first time that Canadian counsel for CJV, upon whom in earlier memorandums the S.E.C. claimed to have been relying to provide information, may himself "be involved in the manipulation" (A48). The memorandum which follows, dated November 7, 1975, in addition to the two introductory paragraphs which were quoted earlier in this brief and have by now become standard in all of these memorandums, does nothing more than repeat prior statements to the effect that the S.E.C. staff is attempting to meet with Canadian counsel for CJV (A50). Everything else is blacked out. The next memorandum, dated November 18, 1975, states that this attorney "no longer intends to discuss the matter with the staff" (A52). Finally, the November 28, 1975 memorandum says nothing at all beyond the two introductory paragraphs (A53-54). The rest is blacked out. The December 5, 1975 memorandum, which has already been discussed, is the same except that, as noted previously, it says that the Royal Canadian Mounted Police investigation concerns, for the most part, activities in Canada prior to the resumption of trading in the U.S. (A56).

The December 19, 1975 memorandum livens things up a bit by stating that (A58):

> "After review by the Division of Enforcement [line of blacked out text] it was determined that supervisory personel at several U.S. broker-dealers should be interviewed in order to resolve any participation in the manipulation."

No explanation is given as to why those broker dealers had not been interviewed previously during the more than seven month period in which the suspension had by then been in effect.

This memorandum also complains about a suit brought against Canadian Javelin Ltd., the Securities & Exchange Commission and Meyer Eisenberg by a director of CJV. The next memorandum, dated December 29, 1975, repeats prior material and refers to the fact that Meyer Eisenberg had been appointed by the United States District Court for the Southern District of New York to represent Canadian Javelin Ltd. in that suit (A60). As noted previously, this information is repeated thereafter through the March 4, 1976 memorandum (A75).

The January 9, 1976 memorandum repeats the by now three standard introductory paragraphs and adds nothing else (A61-62). However, the January 16, 1976 memorandum provides new material by stating that on January 14, 1976, the Royal Canadian Mounted Police had filed a criminal information against Doyle and four others in St. Johns, Newfoundland (A64). It appears from this that the investigation by the Royal Canadian Mounted Police had proven more productive than that the one initiated by the S.E.C. The January 23, 1976 memorandum thereafter complains (A66):

> "To date, there has been no public release by the company concerning the RCMP investigation or the recent criminal informations filed in St. Johns, Newfoundland. Moreover, CJV continues to refuse to cooperate with the S.E.C. staff."

The next four memorandums, dated February 5, 1976, February 12, 1976, February 26, 1976 and March 4, 1976 contain the three standard paragraphs and nothing else (A67-68, A69-70, A71-72 and A74-75). However, the following memorandum, dated March 19, 1976 (A77-78), is highly significant. It states that on March 11, 1976 the S.E.C. approved the filing of injunctive action in the United States District Court for the Southern District of New York (A77). This action was subsequently filed as S.E.C. v Doyle et al, 76 Civil 1882 (WCC). However, since all of the defendants appear to be either persons who are not residents of the United States or corporations who also have no ties within the United States, and since Doyle has already been enjoined twice, on September 25, 1958 and on July 17, 1974, from violating the same rules which the S.E.C.'s new complaint alleges that he violated, it would seem that the filing of this new complaint could not accomplish any purpose.[3] However, the March 19, 1976 memorandum states (A78):

> "The staff believes that with the filing of this complaint, the public purpose for which the suspension of trading of CJV stock was instituted on April 29, 1975 will have been amply served."

The memorandum also states that the S.E.C. staff has the "present expectation that the suit will be filed....on or before the expiration of the current trading suspension" (A78).

It turned out, however, that it took until April 26, 1976 for the S.E.C. to file its complaint and the April 20, 1976 memorandum states that

3. A recent examination of the record of that action, which is still listed as an open case in the Southern District of New York, demonstrates that it may be one of the most self-evidently futile suits ever filed in the federal courts. The complaint seeks only injunctive relief. None of the defendants reside in the United States and U.S. Marshall has been unable to make service on any of them. Unsurprisedly, none of the defendants have filed a notice of appearance. Consequently, the record consists of nothing more than the complaint and the summons with unexecuted Marshal's return.

the lifting of the suspension was being held up for that reason (A87-88). Meanwhile, in an unexpected development, the Canadian courts ordered a reorganization of the board of directors of Canadian Javelin Ltd. and the memorandums dated March 26, 1976 and April 2, 1976 reflect this fact (A81 and A84). It is clear, however, that this particular development was not rationally related to the S.E.C.'s decision to continue the trading suspension particularly since the April 2, 1976 memorandum states (A84):

> "New management has informed us that they wish to cooperate with the staff, waive any attorney-client privilege, and make available all CJV officers, directors and employees to the staff."

There was, however, one remaining matter which had gone unmentioned in all of these memorandums which was the fact that Sloan had been agitating and exhausting his judicial remedies for one year in order to force the suspension of trading to be lifted. This Court had, in effect, ordered the S.E.C. to give Sloan some sort of administrative hearing and on March 11, 1976 the S.E.C. had received a petition from Sloan conforming to the S.E.C.'s requirements. Because of this, rather than lift the trading suspension without responding to Sloan's petition, the S.E.C. staff decided to continue the suspension for one more ten day period. The memorandum, dated April 9, 1976, which discusses this decision, states (A96):

> "As the Commission will recall the United States Court of Appeals for the Second Circuit, in October, 1975, rejected Mr. Sloan's attack on summary trading suspensions based upon the Commission's representation that we would give a person who claimed to be aggrieved by such a suspension an opportunity to be heard (Sloan v Securities and Exchange Commission, C.A. 2, No. 74-2457). The Court indicated at that time that such a hearing should result in a record which could later be reviewed on appeal if that became necessary."

As a result, the S.E.C. issued its last suspension order dated April 21, 1976 (A85-86). This order which, unlike the prior orders, was not published in full text in the Federal Register or anywhere else for that matter, constitutes the only time the S.E.C. ever made a public statement

as to the reasons for its year long trading suspension. This order is couched in the same vague terms which are characteristic of the "informational memorandums" which have just been discussed. The reasons for the suspension are given in two paragraphs as follows (A85-86):

> "According to criminal informations returned in Canada, it appears that the common stock of Canadian Javelin Ltd. may have been artificially manipulated on two Canadian stock exchanges, and that this was continuing after January 26, 1975. The Commission is actively investigating, among other things, possible manipulation of the stock in the United States securities markets. The Commission on April 29, 1975, again suspended trading as a result of a lack of information concerning pending action by Canadian regulatory authorities.
>
> In addition, a number of private civil suits are pending in Canada regarding control of the company. A Canadian provincial court recently issued an order installing a new board of directors and this order is now on appeal."

As noted previously, Sloan was not given the opportunity for a hearing or to present evidence. Moreover, no evidence was offered in support of the S.E.C.'s claims and the facts alleged in Sloan's affidavit were dismissed as "speculation" (A86).

From this analysis it should by now be clear that the suspensions were unjustified and were not supported by substantial evidence and must be set aside. What emerges from reading all of the documents which the S.E.C. has included in the record is an unsubstantiated belief by unidentified members of the S.E.C. staff that persons connected with Canadian Javelin Ltd. have somehow engaged in a stock manipulation, and this belief is coupled with the failure of Canadian Javelin Ltd. and certain persons to "cooperate" with the S.E.C. staff.

Here it should be said that there exists no legal obligation for any person to "cooperate" with the S.E.C. The S.E.C. has vast powers in-

cluding the power to issue subpoenas and the power to institute actions for injunctive relief. However, no free government has ever devised a means, short of torture which is proscribed by the Eighth Amendment, to create the power to compel persons in all cases to "cooperate." Moreover, the S.E.C. apparently believes that the failure to cooperate is a sign of guilt. If it believed otherwise it would not repeatedly cite instances of failure to cooperate in the memorandums which were prepared to justify the trading suspensions. However, in one case involving S.E.C. action, this Court rejected the governments contention that the refusal to cooperate with the S.E.C. could justify what would otherwise be a denial of the Sixth Amendment right to a speedy trial. See United States v. Parrott, 425 F. 2d 972, 975 (2d Cir. 1970).

The fact is that many foreign corporations issue securities which are actively traded in the United States and nevertheless these corporations make no effort to cooperate with the S.E.C. by complying with United States securities laws. For example, Hoffman La Roche & Co., a Swiss corporation, is regarded as perhaps the largest pharmaceutical company in the world. Its shares are actively traded in the United States over the counter market and its current price is $35,000 bid - $38,000 offered per share. The reason that it is regarded as "perhaps" the largest pharmaceutical company in the world is that nobody knows how big Hoffman La Roche & Co. is; the company itself isn't telling. S.E.C. Rule 12g 3-2(b)(1),

17 C.F.R. 240.12g 3-2(b)(1), provides for this situation by stating essentially that issuers of foreign securities which are traded in the United States are required to file with the S.E.C. the same material which they are required to file with the government or the stock exchange in their own country. However, although major European corporations customarily publish their balance sheet in the newspapers once a year, Swiss law provides for no filing requirement and, although the S.E.C. undoubtedly disagrees with this interpretation, Hoffman La Roche & Co. consequently is not required to and does not file any information with the S.E.C.[4]

Foreign issuers of securities who seek to have their securities listed on a stock exchange in the United States must agree to file financial information with the S.E.C. on a Form 20-K. See CCH Fed. Sec. Law. Rep. Vol. 3, 32,221. However, Form 20-K does not provide the detail to be found in a Form 10-K which is required for issuers of securities in the United States. This accommodation is obviously for the purpose of making it more attractive for issuers of foreign securities to have their shares listed here.

However, due to a strange historical quirk, Canadian Javelin Ltd. does not file a Form 20-K but rather files a Form 10-K. Indeed, it is possibly the only foreign issuer of a security who files a Form 10-K.

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4. The CCH Fed. Sec. Law Rep. Vol. 2 23,317 contains a list of all foreign corporations who file reports under this rule. It can be inferred from the relatively small number of issuers who file these reports that almost all of the corporations in the world who have 300 or more U.S. stockholders are in violation of federal securities laws. However, since these laws are not recognized in foreign jurisdictions, which is the reason that John C. Doyle cannot be extradicted, the S.E.C. obviously has no way to enforce its own rules.

The reason for this is that one of the terms of the consent injunction dated September 25, 1958 was that Canadian Javelin Ltd. would list its shares on the American Stock Exchange and would thereafter file the financial reports required of United States issuers of securities. At the time, this was an exceptionally good deal for Canadian Javelin Ltd. whose shares were then blacklisted from all trading in the United States. However, in order to meet the listing requirements of the American Stock Exchange, Canadian Javelin Ltd. was forced to file a Form 10 with that exchange which set forth in detail all of the questionable things Canadian Javelin Ltd. and its principal stockholder and promoter, Doyle, had done over the years. The filing of this Form 10 spawned a total of seventeen derivative actions in the state and federal courts and produced decisions reported as Armstrong v Doyle, 193 N.Y.S. 2d 421 (1959); Weiss v Doyle, 178 F. Supp. 566 (S.D.N.Y. 1959); Finley v Doyle, 178 F. Supp. 863 (S.D.N.Y. 1959) and Gittleman v Doyle, 194 N.Y.S. 2d 401 (1959). The report of the referee in that litigation, which was produced at the cost of $125,000 and which set forth in detail the causes of action against Mr. Doyle, can be found in the files of the New York State Supreme Court under Armstrong v Doyle, supra.

In the case presented here, the fact that Canadian Javelin Ltd. is listed on the American Stock Exchange is essentially irrevelant. The S.E.C. suspended all trading in securities of Canadian Javelin Ltd. and not just trading on the American Stock Exchange.[5] If the suspension were

5. The initial order suspending trading makes this distinction clear. At the time of the April 29, 1975 suspension, the power to suspend trading in securities rested in Sections 15(c)(5) and 19(a)(4) of the Securities Exchange Act, 15 U.S.C. 78o(c)(5) and 78s(a)(4). Section 15(c)(5) dealt with trading in the over-the-counter markets whereas Section 19(a)(4) dealt with trading on stock exchanges. The S.E.C. invoked both sections when it suspended trading here (All).

grounded solely upon the failure to file financial information, it would be illogical to suspend trading anywhere other than on the American Stock Exchange particularly since Canadian securities law does not require financial disclosure comparable to that required by the rules of the S.E.C.

In any event, the suspension here was not based upon the failure to file financial information. Throughout most of the suspension period, Canadian Javelin Ltd. was up-to-date in filing its annual 10-K and quarterly 10-Q reports. What the S.E.C. mainly complains about in its earlier memorandums is the failure of Canadian Javelin Ltd. to issue a press release concerning the investigation being conducted by the Royal Canadian Mounted Police. However, there is no rule of the S.E.C. which requires the issuance of a press release under any circumstances whatever.

The last memorandums do complain that Canadian Javelin Ltd. was late in filing its annual 10-K report. However, this obviously did not form any basis for the trading suspension. Under S.E.C. rules Canadian Javelin Ltd.'s annual report was due on March 30, 1976. See CCH Fed. Sec. Law Rep. Vol. 3, 31,102. The public records of the S.E.C. show that it was ultimately filed on June 1, 1976. The suspension of course, was lifted on May 2, 1976. It is apparent from the S.E.C.'s memorandums that the reason for the lateness in the filing of the report was the sudden change in the management of Canadian Javelin Ltd. Clearly, a new board of directors would not be in the position to file a financial statement with the S.E.C. and to certify that it was correct only a few days after being installed. In any event, by lifting the suspension at a time when Canadian Javelin Ltd. was still delinquent in the filing of its 10-K report, the S.E.C. demonstrated that the delinquency was not the basis for the trading sus-

pension.

The same is true with regard to the reference in the S.E.C.'s order of April 21, 1976, which dealt with Sloan's petition, to the fact that "a number of private civil suits are pending in Canada involving a dispute regarding control of "Canadian Javelin Ltd. (A86). The Wall Street Journal for June 23, 1976 p. 16 col. 4 contains an article which discusses the civil litigation in question and states that since nobody knows who has the legal right to control Canadian Javelin Ltd., a Quebec Superior Court judge has ordered that a special election be held on July 30, 1976 and that both sides be enjoined from soliciting proxies. In addition, this article states that Canadian Javelin Ltd.'s line of credit has been revoked by its bank and that it has only enough funds to meet the next two payrolls.

If there are any circumstances which justify a trading suspension, this state of affairs would seem to provide them. However, there is no suspension currently outstanding in the shares of Canadian Javelin Ltd.

From all this it should be apparent that the suspension of trading in Canadian Javelin Ltd., which lasted for more than one year and caused irreparable injury to its stockholders, had no rational basis. It should be pointed out that in paragraph 23A of the complaint filed on November 29, 1973 in S.E.C. v Canadian Javelin Ltd., 73 Civil 5074 (LFM)[6], the S.E.C. alleged a "proclivity for a lack of candor" on the part of Canadian Javelin Ltd. and in paragraph 45 of the same complaint, under the heading "need for a special receiver, the S.E.C. stated:

6. The full text of this complaint can be found on pp. 3-23 of the appendix in S.E.C. v Canadian Javelin, Ltd., Dkt. No. 75-7046 appeal dismissed (2d Cir. Jan. 7, 1976).

"As set out above the defendants have totally abrogated their duties to the shareholders of CJV and the investing public. Defendant Doyle, the dominant control person of CJV has refused to give sworn testimony concerning CJV's financial status and business operations. Other key persons have been equally available."

In view of these allegations, it is obvious that Canadian Javelin Ltd. has a history of not cooperating with the S.E.C. and that nothing happened on or about April 29, 1975, the date of the initial suspension, to change this state of affairs.

What this all boils down to is that the first and only reason the S.E.C. suspended trading in Canadian Javelin Ltd. was the supposed "public announcement" by the Royal Canadian Mounted Police relating to its investigation. All of the subsequent reasons added on concerning "lack of cooperation" and "pending civil suits in Canada" are "boilerplate" to use a favorite S.E.C. term. It should be mentioned here that the Royal Canadian Mounted Police did not start its investigation at the time of the April 29, 1975 announcement. Every Canadian Javelin Ltd. proxy statement for the past several years has referred to the most recent developments in this investigation and the Wall Street Journal for December 21, 1972 reported that the Royal Canadian Mounted Police had invaded the offices of Canadian Javelin Ltd. and had seized most of its files.[7]

In short, nothing happened on or about April 29, 1975 to so radically alter the state of affairs as to justify a trading suspension. Thus it can be seen that regardless of how one approaches this case and regardless of how far one goes to construe the record in a manner favorable to the S.E.C., there still can be no doubt that there was no rational basis for the trading suspension. Moreover, even if there were a rational basis,

7. Unfortunately, the S.E.C. did not suspend trading on Canadian Javelin Ltd. on that date. Had it done so it would have saved the petitioner the substantial sum of money which he subsequently lost while trading this stock.

the reasons given by the S.E.C. staff are not supported by "substantial evidence." It should also be pointed out that although the S.E.C. staff memorandums sometimes made vague references to allegedly illegal activities by various persons associated with Canadian Javelin Ltd., all of these activities quite obviously occurred outside of the United States. In spite of frequent efforts by the S.E.C. to have the courts rule that the federal securities laws have extraterritorial application, these efforts have proven unsuccessful. In Bersch v Drexel, Firestone, Inc., 519 F. 2d 974 (2d Cir. 1975) affirming in part, 389 F. Supp. 446, 453 (S.D.N.Y. 1974), this Court rejected the S.E.C.'s claims of a broad extraterritorial jurisdiction of federal securities laws. This decision was relied on in Racaman v Barish, 408 F. Supp. 1189, 1194 (E.D. Pa. 1975) which dismissed a complaint for lack of subject matter jurisdiction. It is true that the federal courts on a few occasions have entertained civil damage as well as criminal actions based upon transactions which took place outside of the United States. See Schoenbaum v Firstbrook, 405 F. 2d 200 (2d Cir. 1968); Leasco Data Processing Equipment v Maxwell, 468 F. 2d 1326 (2d Cir. 1972); United States v Clark, 359 F. Supp. 131, 133 (S.D.N.Y. 1973). However, in each of these cases significant fraudulent conduct was alleged to have occurred in the United States.

It should be pointed out that assuming that federal securities laws have extraterritorial application, they can easily be violated by a person in many parts of the world. For example, an individual living in Hong Kong could call his broker at Merrill, Lynch, Pierce, Fenner & Smith, Inc. in Hong Kong and place an order to buy a security at a certain price on a stock exchange in the United States and could almost simultaneously call his broker at Bache & Co., Inc. in Hong Kong and place an order to sell the

same security at the same price. This would be plainly illegal since it is prohibited by Section 9(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(a)(1). At the same time, anyone wishing to throw away money on such a foolish transaction could do so easily. Theoretically, if that person subsequently ever came unwittingly to the United States, he could promptly be indicted and arrested. However, the court decisions just cited make it clear that such an indictment and arrest would be barred by foreign policy considerations and by Section 17 of the Restatement (Second) of the Foreign Relations Law of the United States.

Although the S.E.C. will certainally disagree with this analysis and will contend that the activities of Doyle and others,whether in Nassau, Bahamas, Canada, Panama or Costa Rica, may have violated S.E.C. rules and provisions of federal securities laws, the fact remains that as of this date there has never been a judicial adjudication of this fact. Article 3, Section 2, paragraph 2 of the Constitution provides in pertinent part that: "The trial of all crimes .....shall be by jury...." The federal government has yet to arrest Doyle on charges relating to what may have occurred in 1975, much less bring him to trial. Moreover, Article 1, Section 9, paragraph 3, prohibits bills of attainders. It can be seen from United States v Lovett 328 U.S. 303, 314-318 (1946) that a "bill of attainder" includes any legislative or administrative act which inflicts punishment without a judicial trial. This point was discussed in Part II (B) of the Supreme Courts recent decision in Paul v Davis ____U.S. ____, 47 L. Ed. 2d 405 (March 23, 1976).

There has, of course, been no judicial trial of the "crimes" vaguely alleged in the S.E.C. staff memorandums. Thus, from any point of view,

the suspension orders are not supported by substantial evidence. Therefore, these orders must be set aside.

POINT II

THE PETITIONER HAS BEEN DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO NOTICE AND THE OPPORTUNITY FOR A HEARING.

This point is sufficiently obvious as to not require a lengthy discussion. It has been established in innumerable judicial decisions that the due process clause of the Fifth Amendment requires in most situations that there be notice and the opportunity for a hearing. Supreme Court decisions have however, deleniated a few carefully defined situations where the government is allowed to take summary action without prior notice. However, in all of these cases, an immediate hearing followed by prompt judicial review must be made available. See Commissioner v Shapiro, ____U.S. ____, slip op. 14-18, (March 8, 1976).[8]

For example, in Fuentes v Shevin, 407 U.S. 67, 90-93 (1967) the Supreme Court said that summary governmental action affecting property rights is unconstitutional unless an immediate hearing is available and even then only in extraordinary situations.[9] Other decisions make it clear that the "extraordinary situations" must involve an important governmental interest. For example, an important governmental interest has been held

8. In this case, the petitioner is plagiarizing the argument made by the Solicitor General in the United States Supreme Court. It should be obvious that the very case which the Solicitor General cited demonstrates the unconstitutionality of the summary governmental action here.

9. Fuentes v Shevin, supra is under something of a cloud because the vote was 4-3 and hence an absolute majority of five judges did not concur in the opinion. See North Georgia Fishing v Di-Chem, 419 U.S. 601, 616-617 (1975) (Blackmun, J., dissenting). However, North Georgia

(footnote 9 continued, page 34)

to exist when necessary to protect the public from contaminated food, from misbranded drugs, to aid the collection of taxes or to aid the war effort. See Calero-Toledo v Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974).

It is an understatement to say that the desire of a government agency to suspend trading in a security, regardless of how strong that desire might be, does not reach the level of importance to the existance of the government as the need to collect taxes, for example. For this reason, the petitioner contends that the summary suspension of trading in a security without prior notice and the opportunity for a hearing is in all cases unconstitutional. However, for the purposes of the argument presented in this point it is unnecessary to reach that question because in all cases, regardless of how important the governmental interest is, an aggrieved party is entitled to a hearing and the opportunity for a hearing has not been made available here.

In this case, Sloan demanded a hearing at which the S.E.C. would present whatever testimony and evidence it desired to present for the purpose of showing trading suspensions were justified and Sloan would have the opportunity to cross-examine witnesses and to present evidence in support of his own position. This is obviously what this Court contemplated when, in the prior decision, it in effect directed the S.E.C. to give Sloan an administrative hearing. However, the Secretary of the Securities & Exchange Commission, in his letter to Sloan, made it clear that the S.E.C. was refusing to give Sloan this kind of hearing. Instead, Sloan was di-

footnote 9 cont.: Fishing and many other decisions make it clear that the principle the petitioner is seeking to apply holds in the case presented here.

rected to file an affidavit setting forth facts showing that the S.E.C. had abused its discretion and then the S.E.C. would decide whether to give Sloan the opportunity to be heard. In other words, the S.E.C. shifted the burden of proof from the S.E.C. to Sloan. The shifting of the burden of proof under these circumstances has the effect of depriving Sloan of a constitutionally protected right. See Sugar v Curtis Circulation Co., 383 F. Supp. 643, 648 (S.D.N.Y. 1974) comparing Fuentes v Shevin, supra to Mitchell v W.T. Grant, 416 U.S. 600 (1974).[10]

Sloan was at that point placed in a quandry because the S.E.C. had never made a public statement as to the reasons for its trading suspension and therefore Sloan had no way to determine what facts, if proven, would demonstrate that the reasons given by the S.E.C. were wrong. However, rather than go back to this Court with the problem, Sloan forged ahead by filing an affidavit which complied with the S.E.C.'s requirements.

Nevertheless, the S.E.C. still did not grant Sloan a hearing, not even a hearing where the burden of proof would be on Sloan. Instead, it delayed for as long as possible and then responded with a statement which characterized Sloan's affidavit as "speculation."

It has always been obvious that any attempt to seek from the S.E.C. relief from the S.E.C.'s own suspension orders would prove futile. However, regardless of the apparent futility of his quest, Sloan pursued this matter diligently, at it must be added, great effort and expense, and did everything that it was within his power to do and not only did he not ob-

10. Sugar was reversed sub. nom. Carey v Sugar, ____U.S.____, 47 L. Ed. 2d 587 (March 24, 1976) with instructions to abstain until the parties had the opportunity to obtain from the state courts a construction of the statute.

tain from the S.E.C. the relief he was seeking but the S.E.C. refused to grant him a hearing in spite of being directed to do so by this Court. Under these circumstances, the suspension orders of the S.E.C. must be set aside.

POINT III

SINCE THE TRADING SUSPENSION OF CANADIAN JAVELIN LTD. LASTED FOR A PERIOD WHICH EXCEEDED TEN DAYS, THE SUSPENSION WAS ILLEGAL.

This point is even more obvious than the preceeding point. Section 12(k) of the Securities Exchange Act of 1934, which the S.E.C. invoked in suspending trading in Canadian Javelin Ltd. on every date after June 5, 1975, when that section came into effect, expressly states that:

> "[T]he Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days." (emphasis supplied).

The period here exceeded ten days and hence the suspension orders were illegal.

That would end the discussion were it not for the fact that the petitioner has made this point before and the courts have yet to adjudicate it. However, even the Solicitor General, in the brief filed in the United States Supreme Court, conceded that the question of whether the S.E.C. has the statutory authority to order successive ten-day suspensions is "important." Nevertheless, the Solicitor General urged the Supreme Court not to decide this question, regardless of its importance, because it was not "ripe for review" since no court of appeals had yet made a determination. The Solicitor General's brief also pointed out that the instant proceeding was still pending.

The S.E.C.'s argument that in spite of the express language of the statute it has the authority to suspend trading in a security for an indefinite period of time by repeatedly tacking one 10-day suspension order on to the previous one, is grounded on the point that the S.E.C. has exercised this power for thirty years and Congress has not yet taken the summary suspension power away. The S.E.C. originally gave itself the power to suspend trading for a period more than ten days In the Matter of Red Bank Oil Co., 21 S.E.C. 695, (1945-47 CCH Transfer Binder) 75,610. It should be noted that the S.E.C. has never argued that when Congress passed the original Section 19(a)(4) of the Securities Exchange Act, it contemplated that this section would be interpreted in such a way as to give the S.E.C. the power to suspend trading indefinitely. Rather, it contends that subsequent acts by Congress, including most principally the recent consolidation of Sections 15(c)(5) and 19(a)(4) into Section 12(k) of the Securities Exchange Act, demonstrates that Congress has acquiesced to the S.E.C.'s assumption of this power.

Arguments of the type advanced by the S.E.C. were discussed in Saxbe v Bustos, 419 U.S. 65, 80 (1974) (White J., dissenting). This opinion cited Zuber v Allen, 396 U.S. 168, 185-186, n. 21, 24 (1969) which observed that: "Congressional inaction frequently betokens unawareness, preoccupation or paralysis," and Federal Maritime Commission v Seatrain Lines, Inc., 411 U.S. 726, 745 (1973) which said:

> "[A]n agency may not bootstrap itself in to an area in which it has no jurisdiction by repeatedly violating its statutory mandate."

Mr. Justice White's opening paragraph stated in part, the following:

> " '[A]dministrative practice does not avail to overcome a statute so plain in its commands, as to leave nothing for construction. Norwegian Nitrogen Products Co. v United States, 288 U.S. 294 (1933) (Cardozo, J.) Administrative construction over a long period

of time is an available tool for judicial interpretation only when the statutory terms are doubtful or ambiguous. United States v Southern Ute Indians, 402 U.S. 159, 173 n. 8 (1971); Estate of Sanford v Commissioner, 308 U.S. 39, 52 (1939); Norwegian Nitrogen Products Co. v United States, supra." (emphasis supplied).

In the case presented here there is no room for a doubtful or ambiguous construction of the statute. The statute says that trading may be suspended for a "period not exceeding ten days." That is all. Clearly, then, the suspension orders are illegal and must be set aside.

POINT IV

SINCE THE SECURITIES & EXCHANGE COMMISSION HAS REFUSED TO APPLY THE STATUTE IN A MANNER CONSISTANT WITH THE CONSTITUTION, THIS COURT SHOULD DECLARE SECTION 12(a)(k) OF THE SECURITIES EXCHANGE ACT OF 1934 TO BE UNCONSTITUTIONAL

Although this Court has previously rejected the petitioner's "blunderbuss" constitutional attack as "frivolous," it is submitted that that assessment should be reconsidered in the light of the record presented here. It should be remembered that "all constitutional questions are always open." Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Gideon v. Wainwright, 372 U.S. 335, 346 (1963) (Douglas, J., concurring).

The record the S.E.C. has filed here makes it clear that the S.E.C. will settle for nothing less than the arbitrary and unfettered power to suspend trading in a security. The S.E.C. has been directed to give Sloan the opportunity for a hearing and has refused to do so. The S.E.C. has been given a second chance to develop a record which would meet the "substantial evidence" test and has made no effort to do. The S.E.C. has been warned that the courts might hold that a suspension for a period of longer than ten days deprives a person such as Sloan his constitutional due process rights. Nevertheless, the S.E.C. has continued to exercise its power in an arbitrary manner and has refused to retreat from its prior position. It is even apparent from the record filed here that the attorney for the S.E.C. who argued orally the last time this case came to court, was not telling the truth

when he represented to the Court that the S.E.C. would be willing to give Sloan some sort of administrative hearing.

Uncompromising stands are characteristic of the S.E.C. For example, S.E.C. Rules 122 and 0-4, 17 CFR Sections 230.122 and 240.0-4 require S.E.C. employees to disobey court subpoenas and to go to jail if necessary. See Appeal of the United States Securities & Exchange Commission, 226 F.2d 501 (6th Cir. 1955). In fact, one reason the S.E.C. has become perhaps the most powerful of government agency is its willingness to take a stand against the weight of judicial authority.

It is apparent from Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) and Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1936) as well as this Court's decision in Standard Airlines v. CAB, 177 F.2d 18 (2d A.D. 1949) that the arbitrary exercise by an administrative agency of a power such as the suspension power involved here is unconstitutional where that agency fails to adhere to justiciable standards as set by congress. Schechter Poultry Corp. was recently relied upon by the Supreme Court in National Cable Television v. United States, 415 U.S. 336, 342 (1974) and its companion case Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974). These decisions resurrected the almost forgotten principle that Congress may not delegate its legislative power. Under the definition set forth in Prentis v. Atlantic Coal Line Co., 211 U.S. 210, 226 (1908) a suspension of trading in a security is "legislation".

Anyone who might question whether the Supreme Court has done what it appears to have done should be directed to the decision of Ernst & Ernst v. Hochfelder, __U.S.__, 47 L.Ed.2d 668, 688 (March 30, 1975). There the Supreme Court stated:

> "The rule making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law, rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. "

It has already been demonstrated that the government does not pose an "important" interest in suspending trading in a security and therefore a summary suspension without prior notice and the opportunity for a hearing is unconstitutional. See Fuentes v. Shevin, supra 407 U.S. at 90-93; Calero-Toledo v. Pearson Yacht Leasing Co., supra 416 U.S. at 679. These cases demonstrate that unless the government has an important interest comparable, for example, to its interest in collecting taxes, summary interference with property rights violates the due process clause of the Fifth Amendment. Moreover, the recent decision of Commissioner v. Shapiro, __U.S.__, 47 L.Ed.2d 278 (March 8, 1976) has eroded the government's authority to take summary action even in tax cases.

Not only does the summary suspension of trading in a security fail to promote any important governmental interest, but it actually interferes with the government's interest in collecting taxes. At year's end a suspended security can often be declared as "worthless" and holders of suspended securities

can and often do write off 100% of their investment against any short term trading profits for the year. In addition, under Commissioner v. National Alfalfa Dehydrating, 417 U.S. 134 (1974) the amount of taxes owed to the government can be computed on the basis of the "pink sheets" price as opposed to the cost of a security and if the pink sheets indicate no price, as it does in the case of a suspended security, a substantial reduction in taxes results.

As noted previously, the Supreme Court, in Paul v. Davis, __ U.S. __, 47 L.Ed.2d 405 (March 23, 1976) discussed the application of the constitutional prohibition against "bills of attainder." There it concluded the inclusion by the local police of the name and photograph of a person in a flyer of "active shoplifters" was not a bill of attainder and hence was not unconstitutional. After analyzing a series of cases commencing with United States v. Lovett, 328 U.S. 303 (1946) and continuing through Goss v. Lopez, 419 U.S. 565 (1975), the Supreme Court concluded that the constitution did not protect a person from purely defamatory actions by state officials.

Here a different case is presented because the S.E.C., by an administrative act, has done more than merely defame Canadian Javelin Ltd.; it has proscribed trading in its shares without either notice or a hearing. Under the cases just cited, this is unconstitutional both because it violates the rights guaranteed by the due process clause of the Fifth Amendment and

because it constitutes an unconstitutional bill of attainder.

Here it should be noted that under another recent decision, Singleton v. Wulff, __U.S.__ (July 1, 1976) slip op. at 5-11, Sloan has standing to assert not only his own constitutional right to trade in shares of Canadian Javelin Ltd. but Canadian Javelin Ltd's constitutional right to have its shares freely traded. Sloan's relationship with the S.E.C. is clearly adverse, thus satisfying Part II (A) of the Court's opinion. Id. slip op. at 6. Moreover, "the enjoyment of the right [of Canadian Javelin Ltd. to have its shares freely traded] is inextricably bound up with the activity [Sloan] wishes to pursue" and hence Part II(B) of the Court's opinion is satisfied. Id. slip op. at 8. In addition, the courts might rule that the corporate person of Canadian Javelin Ltd. does not have standing to assert its own constitutional rights, see California Bankers Association v. Schultz, 416 U.S. 21, 55, 72 (1974). Therefore, Sloan has standing to assert those rights in Canadian Javelin Ltd's behalf. Id. slip op. at 9.

It is obvious that the trading suspension of Canadian Javelin Ltd. was instituted for the purpose of punishment, of course, the S.E.C. argues that it was done "to protect the public." This, however, is self evident nonsense. When trading is suspended in a widely held security such as Canadian Javelin Ltd., a multi-million dollar public investment is wiped out. Clearly, these stockholders of Canadian Javelin Ltd. are not protected by the S.E.C.'s action. In fact, the trading

suspension inflicts upon them the maximum potential loss. As to those who do not own shares of Canadian Javelin Ltd., whether they would purchase the stock and lose their money at some future date is a matter of speculation which should not be indulged in by an agency of the federal government. An illustrative example is provided by the S.E.C.'s suspension of Rolls Royce Ltd. in 1971. At the time of the suspension, Rolls Royce Ltd. was trading at around 50 cents per share in the United States even though officials of the British government said that its shares were worthless. By its suspension, the S.E.C. halted a barrage of speculative buying by members of the American investing public while their British counterparts were selling. However, as it turned out, in 1974 the British government announced that it was going to buy back all Rolls Royce Ltd. shares for $1.26 per share. This proved that the S.E.C. was wrong in concluding that the public would be protected by a trading suspension.[11]

For these reasons, it should be apparent that a ten day suspension with neither notice nor the opportunity for a hearing is unconstitutional. This was the result in the analogous case of Goss v. Lopez, supra, 419 U.S. at 579-584 which held that even a ten day suspension from high school without notice or a hearing is unconstitutional. Thus, in view of the record

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11. These facts were alleged generally in paragraphs 164-171 of the complaint in Sloan v. S.E.C. et al., 74 Civil 2792, decided as Sloan v. S.E.C., slip op. 2377 (2d Cir. March 4, 1976).

here, this Court should declare Section 12(k) of the Securities Exchange Act of 1934 to be unconstitutional.

This conclusion is made even more appropriate by the fact that the record here demonstrates the error in permitting government officials to have the unfettered power to vindicate their own authority. The "informational memorandum" reveal a consistant desire by the S.E.C. staff to substitute an inquisitional for an adversary system of justice. For example, they repeatedly express frustration at the failure of Canadian Javelin Ltd. to issue a press release admitting guilt. It is quite apparent that the S.E.C. staff desires to punish Canadian Javelin Ltd. and its officers and stockholders for the failure of certain persons to "cooperate" with the S.E.C. Thus, what is involved here is conduct characterized as closely akin to the "intolerable abuses of the Star Chamber" which was denounced by the Supreme Court in Jones v. S.E.C., 298 U.S. 1, 25-26 (1936).

The members of the S.E.C. staff who initiated the suspension orders are also guilty of dispensing unequal justice. In an S.E.C. staff opinion which is included as Exhibit B in the Appendix to this brief, the S.E.C. gave a no-action letter to one of Sloan's adversaries in litigation. The no-action letter had been requested by Edwards & Hanly, a broker dealer with whom Sloan had delt, because Edwards & Hanly wanted to secure an advantage in a forthcoming appeal to the State of New York Court of Appeals. In granting this request, the S.E.C. in effect gave

Edwards & Hanly the license to violate Section 12(k) of the Securities Exchange Act of 1934 by effecting a purchase and sale of shares of Canadian Javelin Ltd. while the suspension was in effect. It has long been obvious that certain members of the S.E.C. staff have a personal dislike for Sloan, and the fact that a request for a no-action letter was granted under these circumstances clearly demonstrates the unconstitutionality of the S.E.C.'s suspension in the first instance.

If this Court does declare Section 12(k) to be unconstitutional, it will not completely deprive the S.E.C. of the suspension power. Section 12(j) of the Securities Exchange Act of 1934, 15 U.S.C. Section 781(j), would still, in effect, give the S.E.C. the authority to suspend trading for up to one year but only after notice and a hearing. The hearing would be governed by the Administrative Procedure Act, 5 U.S.C. Section 556(d) which would impose upon the S.E.C. the obligation to go forward with proof that the trading suspension is justified. This would substantially reduce the likelihood of an unfair arbitrary or mistaken trading suspension with all of its unfortunate consequences.

POINT V

THIS PROCEEDING IS NOT MOOT

Three times in the past, under vastly differing circumstances, the S.E.C. has suggested that Sloan's challenges to various suspension orders were "moot". In each case, the S.E.C.'s mootness argument has been tied to the fact that each suspension order lasts only ten days and therefore by the time the order comes up for judicial review, it has already expired. However, the S.E.C. has recognized the fact that in Southern Pacific Terminal v. ICC, 219 U.S. 498, 515 (1911) the Supreme Court declared that an attempt to seek review of a temporary order of the sort involved here does not become moot at the expiration of the order because otherwise the courts would be creating a class of "short term orders, capable of repetition yet evading review."

In order to get around this, the S.E.C. has proposed a number of theories in order to reach the improbable conclusion that this case is moot. For example, in the brief filed in the Supreme Court in Sloan v. S.E.C. Dkt. No. 75-1507 cert. denied June 14, 1976, the S.E.C. argued that the case was "probably moot" because:

> "Whether or not the Commission might ever suspend trading in CJL stock is purely a matter of conjecture, as is the question of whether petitioner, if that event should occur, would again claim to be aggrieved."

The fallacy of this argument should be obvious. It is, of course, impossible to predict the future with assurance. At the same time, if the S.E.C. prevails on this argument, court

review of suspension orders will never be possible. It is noteworthy that the last time this case came to this court, the S.E.C. argued that this case was "moot" because recent suspension orders were issued for a different reason than that the prior suspension order. Thus, according to the S.E.C.'s logic, every time the S.E.C. comes up with a new reason for continuing its trading suspension, the controversy arising out of the prior suspension orders becomes "moot". It is obvious again from this argument that the S.E.C. seeks nothing less than the ability to frustrate all judicial review of suspension orders.

It has been established that a voluntary cessation of allegedly illegal conduct does not make a controversy moot. See United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). In the case presented here, Sloan is alleging, inter alia, that a suspension for a period of more than ten days is illegal. To give the S.E.C. the power to put itself beyond the jurisdiction of the court merely by terminating the trading suspension would be to give the S.E.C. "a powerful weapon against public law enforcement," Id. and the S.E.C. would "be free to return to [its] old ways. This, together with the public interest in having the legality of the practices settled, militates against a mootness conclusion." Id.

The principle that certain types of cases are not moot because they would otherwise be "capable of repetition yet evading review" is dismissed in Roe v. Wade, 410 U.S. 113, 125 (1973) and Sosna v. Iowa, 419 U.S. 393, 399-403 (1975). In both of these cases, the plaintiff lost all interest in the

outcome of the controversy shortly after the action was instituted and yet the Supreme Court held that the case was not moot. The case presented here is considerably less susceptible to a mootness argument. To begin with, the S.E.C. has not terminated the allegedly illegal conduct. Although its suspension of trading in Canadian Javelin Ltd. has now been terminated, the S.E.C. still has under suspension all securities of Equity Funding Corp. That suspension started in 1972, has continued to this day without interruption. Thus, the S.E.C.'s present interest in upholding the validity of its exercise of the suspension power is clear. Moreover, although the S.E.C.'s suspension of trading in Canadian Javelin Ltd. has technically terminated, the S.E.C. still has been able to prevent any resumption of trading because of the operation of S.E.C. Rule 15c2-11, 17 CFR Section 240.15c2-11. One feature of the S.E.C.'s application of Rule 15c2-11 is that any security which has been suspended from trading for more than ten days may not resume trading unless a market maker in that security submits a quotation application which provides financial information concerning the issue. Among other things, Rule 15c2-11 makes it clear that the market maker may be held liable if the financial information proves to be incorrect. In a practical case, such an onerous rule is bound to and does freighten all prospective market makers into declining to make a market in a security such as Canadian Javelin Ltd. This explains the fact that there is no public market for shares of Canadian Javelin Ltd. in the United States. Logically, if the suspension orders

were now declared to have been illegal, all along, trading could be resumed without the necessity of submitting a quotation application under Rule 15c2-11. Thus, Sloan will benefit and the S.E.C. will be adversely affected if Sloan prevails in this case.

It is also significant that Sloan moved for a stay and for an expedited judicial review while the suspension was still in effect. If the court now declares the case to be moot, the court will be stating that by virtue of the law's delays a case can become moot automatically. It is clear from Sibron v. New York, 392 U.S. 40, 51-53 (1968) and United States v. Schrimsher, 493 F.2d 842, 843 (5th Cir. 1974) that the courts cannot declare a case such as this to be moot.

CONCLUSION

For all of the reasons set forth above, the orders of the Securities and Exchange Commission suspending trading in Canadian Javelin Ltd. must be set aside.

Respectfully submitted,

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SLOAN

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 28 day of July 197 6 deponent served the within Brief upon:

Fred B. Wade, Securities & Exchange Commission

attorney(s) for

Respondent

in this action, at

500 N. Capitol St.
Washington, D.C. 20549

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 28
day of July, 197 6

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132045
Qualified in Richmond County
Commission Expires March 30, 1977